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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Pacific Wood Treating Corporation, Respondent	)	Docket No. RCRA-1085-09-26-3008P

Resource Conservation and Recovery Act - EPA Enforcement of State Operated Hazardous Waste Programs - Prior State Enforcement Action - Preclusion - Chief Judicial Officer's statement in order of July 28, 1986, granting sua sponte review of decisions in Martin Electronics, Inc., RCRA-84-45-R (Initial Decision, June 21, 1985, on Reconsideration, January 14, 1986) to the effect that he would regard the General Counsel's opinion of May 9, 1986, as the sole authoritative Agency pronouncement on the legal issue of RCRA overfiling held binding on ALJ and to preclude application of rationale in BKK Corporation, RCRA (3008), Appeal No. 84-5 (Final Order, May 10, 1985) to prospective cases. Matter of whether state action was timely and appropriate within meaning of Deputy Administrator's memorandum of May 19, 1986, providing guidance on RCRA overfiling, held to be a matter of policy and prosecutorial discretion not subject to question in civil penalty proceeding.

Resource Conservation and Recovery Act - EPA Enforcement of State Operated Hazardous Waste Programs - Prior State Enforcement Action - Estoppel - Where State of Washington Department of Ecology as part of an enforcement action approved a closure plan for a facility which had not achieved interim status, which plan did not comply with 40 CFR Part 265, Subpart F requirements and it appeared reasonable under the circumstances to consider strict compliance with Part 265 standards was not required and Respondent accomplished closure in accordance with the plan, EPA at the very least being well aware of the closure, EPA was, nevertheless, held not estopped to bring an enforcement action based on contention strict compliance with Part 265 standards was required, because affirmative misconduct by EPA was not shown and estoppel may not be invoked to contradict a clear mandate of Congress. Circumstances enumerated above held to be matters appropriately for consideration in determination of penalty, if any.

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Opinion and Order Denying Motion To Dismiss
Or, Alternatively, For An Accelerated Decision

This is a proceeding under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6928).1/ The proceeding was initiated by a complaint and compliance order,

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1/ Section 3008 of the Act provides in pertinent part:

(a) Compliance Orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

* * * *

(c) Requirements of Compliance Orders -- Any order issued under this section may include a suspension or revocation of a permit issued under this subtitle, and shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

* * * *

(g) Civil Penalty -- Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

issued on September 30, 1985, charging Pacific Wood Treating Corporation (PWT or Respondent), with violations of the Act and applicable regulations, 40 CFR Part 265, and equivalent regulations found in Chapter 173-303 of the Washington Administrative Code.

The complaint alleged, inter alia, that PWT owned the Ridgefield Brick and Tile land disposal site, consisting of a hazardous waste landfill, approximately 0.75 acre in size, in Ridgefield, Washington, and that hazardous waste disposed of in the landfill consisted of ash from the PWT wood-waste boiler plant contaminated with regulated wastes, D004 (arsenic) and K001 (bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol). It was further alleged that waste was first deposited at the mentioned facility in 1979 and last deposited at the facility on January 25, 1983, that closure of the facility has not been completed and that PWT was requested by the Washington Department of Ecology (DOE) and EPA to submit Part B hazardous waste permit application, which is [was] due on October 11, 1985. During inspections of the PWT facility on June 12, 1984 and April 30, 1985, PWT was allegedly in violation of 40 CFR 265.145, requiring that an owner or operator of each disposal facility establish financial assurance for post-closure care of the facility; of § 265.91, requiring the installation of groundwater monitoring wells which are capable of the immediate detection of hazardous waste or hazardous waste constituents that may migrate from the waste management area to the uppermost acquifer; of § 265.92(b) and (c), which stipulate the parameters that must be measured as part of a facility's

groundwater monitoring program; of § 265.93(a), requiring an outline of a groundwater quality assessment program be prepared; of § 265.112, requiring submission of a closure and post-closure plan adequate to meet the requirements for landfills (Part 265, Subpart G and § 265.310) and failure to submit a post-closure plan designed to comply with groundwater monitoring requirements, 40 CFR 265, Subpart F. For these alleged violations, it was proposed to assess Respondent a penalty of $22,500. Respondent was ordered to submit verification and documentation that it has complied with financial requirements of 40 CFR 265, Subpart H, to submit a written plan and schedule for achieving compliance with groundwater monitoring requirements of Part 265, Subpart F and to submit closure and post-closure plans, complying with requirements of Part 265, Subpart G, all within 30 days of receipt of the order.

Respondent answered, denying that the wastes in question were hazardous, alleging that the facility in question had been closed, that its groundwater monitoring system has been approved by both DOE and EPA and that Respondent has submitted a post-closure plan and groundwater monitoring program which have been approved by both EPA and DOE. Respondent requested a hearing.

By letter, dated April 29, 1986, PWT informed the ALJ that it contemplated filing a motion for an accelerated decision in accordance with Rule 22.20 (40 CFR Part 22) and by an order, dated May 9, 1986, the ALJ established a schedule for submission of the motion and for briefs on the issues raised.

Under date of May 23, 1986, PWT filed a Motion To Dismiss Or Alternatively For An Accelerated Decision in Accordance with Rule 22.20 (40 CFR Part 22). The basis for the motion is that DOE, with the concurrence of EPA, has taken

enforcement action on the violations here alleged and that in accordance with the decisions in BKK Corporation, RCRA (3008) 84-5 (Final Order, May 10, 1985); vacated on Petition For Reconsideration (Order of Administrator, October 23, 1985) and Martin Electronics, Inc., Docket No. RCRA-84-45-R (Decision On Motion For Reconsideration, January 14, 1986),2/ EPA is precluded from prosecuting the instant action. Alternatively, PWT argues that principles of estoppel apply and that the action may not be prosecuted for that reason.

F A C T S

The following facts, have been gleaned from memoranda submitted by the parties in support of their respective positions and accompanying affidavits and documents. PWT presently operates, and, since 1964, has operated a pole yard, wood fabrication plant and wood preserving facility on the Lake River in Ridgefield, Washington. Wood treatment activities at the plant include the pressure application of creosote, pentachlorophenol (penta) and copper chrome arsenic as wood preservatives. Wood preserving processes create a waste stream consisting of water, wood sugars, etc., removed from the wood and process liquid containing preservatives. The waste stream is pumped to oil/water separators where recovered wood preservative chemicals are returned to the process for re-use. Wastewater from the separators is treated and filtered to remove solids. The wastewater treatment process generates a sludge, designated K001 in 40 CFR 261.32.

2/ Sua sponte review of this decision as well as of the initial decision has been granted by the Judicial Officer (Martin Electronics, Inc., RCRA (3008) Appeal No. 86-1, Order For Sua Sponte Review, July 28, 1986).

This sludge assertedly has a high BTU value and during the energy crisis of the 1970's PWT designed a boiler plant to utilize such sludge and waste wood as a fuel in lieu of oil or natural gas.3/ Sludge assertedly constitutes less than one-half of one percent of the fuel mixture. Combustion of the fuel created an ash for which it was necessary that PWT find a disposal site. The site chosen was a pit created by the excavation of clay for the manufacture of brick at an abandoned facility, Ridgefield Brick and Tile (RBT). Landfilling of the ash at the mentioned site began in 1978 and was discontinued on January 25, 1983, because of orders from DOE and EPA.4/

PWT claims that DOE and EPA were aware of Respondent's disposal practices and says that it continued to dispose of ash in the manner indicated after the sludge was identified as a hazardous waste, because it had implied, if not actual, approval of DOE and EPA, for such disposal (Moothart affidavit at 5). This claim is based on the federal government's encouragement of use of PWT's redesigned boiler plant and upon the fact the RBT site was identified in its original Part A permit application (Memorandum at 6). At a meeting at the PWT facility on January 28, 1983, attended by representatives of DOE and EPA, called for the purpose of discussing whether PWT should submit Part B hazardous waste permit application for its incinerator, ash disposal was also discussed.

3/ The federal government encouraged such projects. See EPA Grant Agreement/Amendment attached to the affidavit of Mark Moothart, President of PWT.

4/ The date of January 25, 1983, appears to be erroneous, because EPA personnel appear not to have learned of PWT's disposal activities until January 28, 1983 (affidavit of Robert Stamnes).

By letter, dated April 21, 1983, PWT was informed by EPA that inasmuch as neither a Notification of Hazardous Waste Activity nor a Part A permit application had been submitted for the RBT site, disposal of hazardous waste at this site violated RCRA and applicable regulations.5/ At a meeting held in the DOE offices on April 28, 1983, attended by representatives of EPA, PWT agreed to develop closure and post-closure plans for the RBT site. Under date of May 25, 1983, PWT submitted what was referred to as an amended Part A permit application covering the RBT landfill executed by PWT as operator and Elmer C. Muffett as legal owner.6/ The letter accompanying the application referred to a Part A application, dated November 14, 1980, which assertedly referred to the "D80 landfill" on RCRA Form 3, but inadvertently failed to indicate the landfill's location on an attached map. According to Mr. Egbers, this application identified the Process Code as D08 rather than D80 (affidavit at 3).

PWT employed consultants, Sweet, Edwards and Associates, Inc. to investigate groundwater conditions at the RBT site and Patrick H. Wicks to prepare closure and post-closure plans for the facility. On June 20, 1983, DOE issued Notice of Penalty, No. DE83-284, assessing a penalty of $20,000 7/ against PWT for operating an unpermitted landfill for the disposal of dangerous waste.8/ PWT was ordered, should it elect to close the RBT site, to submit a groundwater monitoring plan capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer in accordance with 40 CFR Part 265, Subpart F, together with a schedule of implementation, a closure plan, a

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5/ An identical letter was sent to the owner of the RBT site, Mr. Elmer Muffett.

6/ PWT alleges, and Complainant denies, that this application was treated as a nullity by EPA or DOE (Stamnes affidavit).

7/ Payment of the penalty has been deferred.

8/ The State of Washington identifies wastes subject to the Act as dangerous rather than hazardous.

post-closure plan and a schedule for implementation and evidence of financial assurance to fund site closure and post-closure. At a meeting at the RBT site on July 6, 1983, attended by Eric Egbers of DOE and Dave Myers of Battelle Columbus Labs,9/ a representative of Sweet, Edwards, and Associates explained their hydrogeological approach to closure and groundwater monitoring. According to Mr. Moothart, agency representatives approved the overall approach and plan as described. PWT submitted its draft closure and post-closure plans on July 15, 1983. DOE commented on the plan in a letter to PWT, dated August 4, 1983, and EPA submitted comments to DOE on the plan on August 10, 1983.

The mentioned plan provided three options for closure which included soil testing, drying the existing pond,10/ construction of a top seal over the waste, installation of vents, final grading, monitoring lysimeters,11/ seeding the top seal or grade and fencing as common features. Option III, the one ultimately selected, was the more stringent, because it provided for complete relocation of the waste onto a new bottom seal,

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9/ Mr. Moothart says that Mr. Myers attended the meeting as a representative of EPA. While Mr. Egbers, formerly of DOE, states that Battelle was under contract with EPA concerning the permitting of incinerators such as PWT's boiler, he, nevertheless, supports Mr. Moothart's statement that Myers was EPA's representative at this meeting.

10/ At this time, only the north end of the RBT pit (pond) had been filled.

11/ A lysimeter, as described by Mr. Wicks, is a monitoring device used for collecting groundwater samples, usually at depths of less than 60 feet, consisting of a section of plastic pipe with a porous ceramic cup at the lower end and a seal or stopper at the upper end. Two small tubes are inserted in the stopper, one of which extends into the ceramic cup at the lower end of the pipe. Extraction of samples is accomplished by clamping the tubes, thereby creating a vacuum, drawing water into the pipe, which is collected by applying air pressure to one of the tubes.

installation of an underdrain to further protect groundwater and installation of a toe drain as a leachate control feature and an additional monitoring point.

DOE comments on the draft plan pertinent here include the fact that the draft did not address the implementation of a groundwater monitoring plan designed to show the facility's impact on the quality of groundwater in the uppermost aquifer and that, while the "seasonally saturated zone" referred to in the draft may not qualify as an aquifer, it may prove to be an "excellent early warning system." DOE further stated that the lower, year-round water bearing aquifer must be monitored with one upgradient and three downgradient wells. Existing domestic wells may be used, in part, for this purpose, but that a quality monitoring well should be installed, upgradient of the site, to yield accurate soil profiles and establish accurate background water quality. All lysimeters and/or wells were to be installed in accordance with Chapter 18.104 RCW and Chapter 173-160 WAC.12/ Additionally, DOE stated that the current location of lysimeters did not appear to be justified and that inasmuch as 40 CFR Part 265, Subpart F was being used as guidance, it was recommended that sampling for fluoride, coliform bacteria, manganese and sodium be deleted and sampling for copper, pentachlorophenol and napthalene be substituted.

EPA comments on the draft closure plan which had apparently been transmitted by telefax to DOE on July 27, include a statement to the effect that the plan is generally comprehensive and well done13/ and that: "The

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12/ Washington statutes and administrative code sections referred to are apparently identical to 40 CFR Part 265, Subpart F.

13/ Complainant alleges that PWT received this letter approximately three months ago in response to an FOIA request.

disposal site did not qualify for interim status and therefore cannot legally be closed as an interim status facility. EPA is willing to accept, however, an environmentally sound closure alternative that includes measures equivalent to the interim status closure and post-closure requirements, if such closure and post-closure requirements can be incorporated into an EPA enforcement document such as a consent agreement. * * *." Regarding groundwater monitoring, EPA stated that "PWT needs to design a GW monitoring system that is consistent with 40 CFR Part 265, Subpart F, but which considers that this site will be closed. This system should include four monitoring wells (one up and three down). Some of these wells may be wells already identified in PWT's Preliminary GW Report." EPA also pointed out that chemical parameters proposed for sampling were not totally appropriate for post-closure GW monitoring and that the parameters selected should reflect hazardous waste in the pit such as penta and creosote.

At a meeting in Olymphia on August 18, 1983, attended by Mr. Moothart, Randy Sweet of Sweet, Edwards and Associates, Patrick Wicks, Eric Egbers of DOE and Michael Brown of EPA, comments on the closure and post-closure plans were reviewed and it was agreed that changes would be included in an addendum to the closure plan. EPA and DOE representatives were apparently anxious that closure be completed prior to the onset of fall rains. Mr. Brown states that he consistently maintained the position, both with DOE and PWT, that a groundwater monitoring system in accordance with Part 265 standards should be installed and flatly denies ever approving or concurring in the system installed by PWT (affidavit). PWT submitted an addendum to the closure plan on August 24, 1983, the addendum was discussed at a meeting with DOE on

August 31, 1983, at which Mr. Egbers verbally authorized proceeding with closure in accordance with the plans and understandings reached.

Between September 14 and October 16, 1983, PWT began and achieved closure of the RBT site. On October 16, 1983, DOE issued an order approving PWT's closure plans as amended on August 24, 1983, subject to certain conditions, among which were that soil borings were to be sampled and analyzed to determine the depth of contamination, soils were to be analyzed for the presence of arsenic, pentachlorophenol and napthalene and that soils underlying the waste could remain in place, if arsenic concentration was less than 5.00 ppm, penta less than 1.01 ppm and napthalene less than 2.30 ppm. Additionally, the order called for the sampling and analysis of leachate for the mentioned parameters and for the sampling of three downgradient (domestic) wells, i.e., No. 2 (Falls), No. 4 (Rutkowski) and No. 5 (Muffett).

PWT submitted a report on certification of closure, dated February 15, 1984. An inspection of the RBT site was conducted on June 15, 1984, by Michael Brown and Art Whitson of EPA accompanied by Dave Myers of Battelle Columbus Labs (hydrogeologist) and Kirk Pierce of DOE. It was determined that the groundwater monitoring system was not adequate to detect immediate groundwater contamination in the uppermost aquifer under the site (Inspection Report, dated October 31, 1984). The report pointed out that wells in the existing system were active drinking water wells of which not enough information was known about installation and screening depth and that, more importantly, the wells were an order of magnitude too far away from the encapsulated waste area to immediately detect contamination. Additionally,

it was noted that parameters being sampled were not the standard RCRA parameters and that DOE had not taken action to require PWT to stop the discharge of leachate that overflows the toe drain during the winter months.

On April 30, 1985, a second inspection of the RBT site was conducted by Mr. Robert Stamnes of EPA (Memorandum, dated May 14, 1985). Concerns noted by Mr. Stamnes, in addition to those noted in the previous inspection, included the fact the aquifer in the sand at the base of the waste is seasonal, which meant that the next lower aquifer must be monitored as it would then be the uppermost aquifer, that above background levels of chromium and arsenic were found in a domestic well some distance from the waste unit and that leachate sumps, one of concrete and the other a 55-gallon drum, may leak. Because of the Hazardous and Solid Waste amendments of 1984,14/ PWT had been requested by letter, dated April 9, 1985, to submit Part B hazardous waste permit application, and a discussion ensued as to whether PWT intended to submit the application. Mr. Moothart's answer was that, because of adverse economic conditions and the sums expended for closure,15/ the company could not afford to do so. In a letter, dated September 3, 1985, PWT declined to submit the Part B application, pointing out, inter alia,

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14/ Section 3005(i) of the Act as amended provides:

> (i) Interim Status Facilities Receiving Wastes After July 26, 1982. The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 3004 to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) which receives hazardous waste after July 26, 1982.

15/ PWT alleges that costs of closure, which included purchase of the RBT site, were in excess of $150,000.

that the site had been closed under orders from and in accordance with directives of EPA's legal representative, DOE.

Arguments of the Parties

Because the RBT site had not qualified for interim status, PWT alleges that DOE determined that it should be treated as an illegal disposal operation and closed in an enforcement proceeding (Memorandum In Support Of Motion at 10). PWT says that DOE used 40 CFR Part 265 Interim Status Standards as a guide, but concluded that strict compliance with these regulations was not required. It is further alleged that this approach was discussed with and approved by EPA.

PWT refers to the alleged violations as stated in the complaint (ante at 3,4) and points out that the DOE Notice of Penalty required PWT to submit evidence of financial assurance, a groundwater monitoring plan and closure and post-closure plans. Because DOE approved the closure and post-closure plans, including groundwater monitoring procedures and parameters, PWT asserts that it is clear the violations alleged in the complaint and compliance order were addressed in the State enforcement action. Accordingly, PWT argues that the only relevant issue is whether the DOE enforcement action was reasonable and appropriate.

Notwithstanding that the Final Order in BKK (ante at 6) has been vacated and accorded no precedential value by the Administrator's order on reconsideration, dated October 23, 1985, PWT argues that the reasoning and logic of BKK may nevertheless be followed, citing Martin Electronics, Inc. (ante at 6) (Memorandum at 13). PWT says that the key similarity is the direct involvement of EPA in state enforcement actions. PWT further argues that Congress clearly intended that primary enforcement of RCRA reside with the states and

that the Congressional desire for uniformity of enforcement cannot be furthered by allowing the instant prosecution to proceed.

It is contended that EPA approved the DOE enforcement action and that this is persuasive evidence that the action was reasonable and appropriate not only overall, but also as to each violation alleged in the complaint (Memorandum at 20-24). Alternatively, PWT says that EPA should be estopped to maintain this action, even though it recognizes that decisions on this point cited in the initial decision of BKK (Home Savings and Loan Association v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) and Community Health Services, ETC v. Califano, 698 F.2d 615 (3rd Cir. 1983) have been vacated, sub nom. Walters v. Home Savings and Loan Association, _____ U.S. _____, 104 S.Ct. 2673 (1984) or reversed, Community Health Services v. Heckler, _____ U.S. _____, 104 S.Ct. 2218 (1984)).

Responding to the foregoing arguments, Complainant describes PWT's use of domestic wells for monitoring purposes as "inadequate and makeshift," alleges that the system is not even remotely in compliance with applicable standards and asserts that DOE acted improperly in approving this system (Memorandum In Support Of Response In Opposition, dated June 20, 1986, at 2). Complainant emphasizes that the presence of an authorized state program operating in lieu of the federal program pursuant to RCRA § 3006[16/] is no bar to EPA enforcement pursuant to § 3008 and that Congress specifically recognized this dual enforcement scheme in legislative history.[17/] Complainant points out that the Hazardous and Solid Waste Amendments of 1984

16/ The State of Washington was granted interim authorization to operate its hazardous waste program, Phases I and II, on August 2, 1983 (48 FR 34954) and final authorization on January 30, 1986 (51 FR 3782).

17/ House Committee on Interstate and Foreign Commerce Report No. 94-1461 (September 9, 1976) and Senate Committee on Public Works Report No. 94-988 (June 25, 1976).

(P.L. 98-616, November 8, 1984) imposed additional requirements, citing § 3005(i) (note 14, supra), and that these new requirements are to be administered by EPA until such time as a state amends its program to include these requirements.18/

While acknowledging that PWT did not achieve interim status, Complainant nevertheless contends that Interim Status Standards in WAC 173-303-400, which incorporates 40 CFR Part 265, Subpart F, apply. It cites 40 CFR 265.1 "Purpose, scope, and applicability," § (b) of which makes clear that the standards of Part 265 apply not only to facilities which treat, store and dispose of hazardous and which achieved interim status, but also to owners and operators of facilities in existence on November 19, 1980, who have failed to provide timely notification as required by § 3010(a) of the Act and/or failed to file Part A of the permit application as required by 40 CFR 270.10(e) and (g). Complainant says PWT is within the latter category and thus subject to Part 265. Although the cited language was added to the regulation by an amendment published November 22, 1983 (48 FR 52718), Complainant argues that this was merely a clarification of the rule and not a change.19/

18/ Complainant says that until a Part B permit is issued, interim status standards in Part 265 apply and that PWT has refused to submit a Part B permit application. This refusal is not at issue here.

19/ Opposition at 10, 11. The note explaining the reason for the amendment lends some support for this assertion stating at 48 FR 52719: "It has been EPA policy that existing facilities operating without interim status or a permit should, at a minimum, comply with the Part 265 interim status standards." On the other hand, it refers to the language of then § 265.1(b) to the effect that the standards in this Part apply to owners and operators of facilities which treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status and provides: "This regulatory language has created some uncertainty as to whether the Part 265 standards apply to existing facilities which have failed to qualify for interim status. EPA believes that this language

Complainant emphasizes the language on page 2 of the EPA comments to DOE (letter, dated August 10, 1983) to the effect that PWT needs to design a GW monitoring system that is consistent with 40 CFR 265, Subpart F, but which considers that this site will be closed (Opposition at 11-13). Complainant further emphasizes the language in the letter that "(t)his system should include four monitoring wells (one up and three down)" and asserts that it is, and has been, EPA's position that closure of the RBT must be accomplished in strict compliance with WAC 173-303-400, which incorporates Part 265, Subpart F. Complainant denies that any assurance or comments to the effect that the Part 265 standards were not applicable were ever made by EPA to PWT and asserts that this action is for the purpose of correcting DOE's mistaken interpretation of the regulations.

Citing an opinion of the General Counsel, dated May 9, 1986, which is to the effect that the Administrator's authority to take enforcement action under § 3008 of the Act is not effected by prior state action concerning the same alleged violations and a memorandum from the Deputy Administrator "Guidance on RCRA Overfiling," dated May 19, 1986, providing in pertinent part that "(o)verfiling should be employed in cases where the state's action is clearly inadequate," Complainant argues that the instant action is not barred by the prior DOE orders. It urges that the rule in BKK is not the

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Footnote 19 continued

does not preclude application of the interim status standards to non-interim status facilities given that § 265.1(b) does not expressly limit the application of the Part 265 standards to only interim status facilities. Therefore, EPA has both the statutory and regulatory authority to apply either the Part 264 general permitting standards or the Part 265 interim status standards to existing facilities which have failed to qualify for interim status." This language seems more concerned about the Agency's authority than it is about the crucial question of notice to the regulated community as to the requirements applicable to firms not qualifying for interim status.

law and should not be followed. Even if the BKK rule were applicable, Complainant says the DOE actions were inappropriate under any standard and that this action should not now be barred (Opposition at 16). Dissatisfaction with the monitoring system installed by PWT includes the alleged fact that lysimeters are located in the unsaturated zone above the uppermost aquifer and are susceptible to clogging by sand or soil. Complainant says the domestic wells relied upon by PWT are not constructed for monitoring and testing, because, inter alia, they do not contain appropriate screening and packing. Moreover, these wells are assertedly located too far from the landfill to immediately detect a release therefrom. It is further alleged that the PWT system is not equipped to detect releases which may have occurred previous to the installation of the system.20/ For these reasons, Complainant says the BKK and Martin Electronics decisions are clearly distinguishable, because in those cases significant actions were taken to achieve compliance, while the system installed by PWT is not even remotely in compliance with Subpart F standards. Complainant asserts that DOE was simply wrong in approving the PWT system and that, in accordance with Congressional intent as expressed in § 3008, it is entirely appropriate that EPA step in and correct these obvious deficiencies (Opposition at 18).

Citing Heckler v. Community Health Services (ante at 15), Utah Power and Light Co. v. United States, 243 U.S. 389 (1917); and TRW Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981), Complainant contends that estoppel should not apply in this case because: (a) EPA personnel never stated that

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20/ Complainant's technical criticism's of the PWT monitoring system are principally based upon the affidavit of an EPA hydrogeologist, Frederick Wolf.

interim status standards were inapplicable, (b) there is no written communication between EPA and PWT to that effect and (c) public policy considerations in the application of proper standards for the closure of a hazardous waste site outweigh any burden on Respondent in the matter (Opposition at 13).

Responding to the foregoing arguments, PWT emphasizes that EPA's only objection to the closure and post-closure plans is the alleged inadequacy of groundwater monitoring (Reply, dated July 1, 1986). Acknowledging that its plans do not conform to Part 265, PWT says that the plans were designed to be consistent with Part 265 and, more importantly, that this is all that was required of it by DOE and EPA at the time of closure. Relying heavily on the August 10 letter to DOE, PWT disputes Complainant's assertions that EPA has consistently taken the position that strict compliance with Part 265 was required. PWT points out that in referring to interim status standards and groundwater monitoring, the mentioned letter (ante at 10, 11) uses the phrases "equivalent to" and "consistent with," which cannot mean strict compliance. It argues that EPA representatives had to know that DOE believed it was acting with EPA concurrence[21/] and asks rhetorically if strict compliance with Part 265 was required, why did not EPA inform DOE and PWT of this fact? According to PWT, the answer is clear, strict compliance with Part 265 was not the Agency's position until sometime in 1985--allegedly two years after closure was completed.

21/ The affidavit of Eric Egbers is to the effect that EPA was kept fully informed of DOE's actions concerning approval and inspection of the closure. Complainant asserts that Mr. Egbers misstates EPA's position as set forth in the August 10 letter (Opposition at 12).

Turning to Complainant's specific objections to its groundwater monitoring system, PWT points out that failure to "immediately detect groundwater contamination" is not a criticism contained in Mr. Wolf's affidavit (note 20, supra), and accordingly, states that this appears to be a conclusion of Complainant's counsel (Reply at 6). Furthermore, relying on Mr. Wick's affidavit, PWT contends that monitoring of the toe drain and of the underdrain provides a rapid indication of the potential for migration of contaminates in the waste encapsulation area.

As to the Complainant's objections to the use of domestic water wells and lysimeters for monitoring, PWT refers to the EPA comment (letter, dated August 10, 1983, ante at 9) to the effect that some of these [monitoring] wells may be wells already identified in PWT's Preliminary GW Report and argues that because no other wells were identified on the mentioned report, this constituted approval of the use of domestic wells for monitoring purposes. PWT acknowledges that lysimeters are subject to clogging, but points out that the post-closure groundwater monitoring plans require replacement of improperly functioning lysimeters and that PWT was not required to monitor for parameters (iron, sulphate, pH and total organic halogen) of which Mr. Wolf (note 20, supra) expressed concern.

PWT, relying on the second affidavit of Patrick Wicks, says that Complainant's concern about the inability of the monitoring system to detect releases from the landfill which may have occurred prior to installation of the present system ignores sampling and testing performed prior to closure which indicated essentially no migration of hazardous waste constituents

had occurred.22/ According to Mr. Wicks, samples from pond water and from domestic wells yielded similar results (Second affidavit at 2, 3). Moreover, because all of the waste was removed to the new waste encapsulation cell, PWT asserts that the regulations (40 CFR 265. 258) do not require groundwater monitoring and that Complainant's concern about prior contamination is unfounded as no such contamination exists. According to PWT, the only contamination of concern is that from the new waste encapsulation area and it is that [potential] contamination, which PWT's toe drain, underdrain, domestic wells and lysimeter monitoring address (Reply at 9).

Asserting that Complainant's denial that it approved the RBT closure in writing is ludicrous and that the evidence is overwhelming that EPA approved the closure, PWT reiterates its contention that Complainant is estopped to maintain this action (Reply at 11, 12).

D I S C U S S I O N

In his order granting sua sponte review in Martin Electronics, Inc. (copy enclosed), the Chief Judicial Officer stated that because of the Deputy Administrator's action in the guidance on RCRA overfilings memo (ante at 17) he would regard the General Counsel's opinion as the sole authoritative Agency pronouncement on the legal issue of overfiling under RCRA. This

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22/ Mr. Wicks describes three auger hole borings, designated AH-1, AH-2 and AH-3, from which 11 samples were collected at depths ranging from three feet to 22 feet below ground surface. Samples were tested for napthalene, penta and arsenic and all results were below the detection limit with the exception of a sample from AH-3 at 11 feet which showed 0.012 ppm arsenic (EP toxicity test).

statement is binding on the ALJ and effectively removes the decisions in BKK and Martin Electronics, Inc. and the rationale thereof as a bar to the instant proceeding. While it might be argued that the Deputy Administrator's stricture "Regions should continue to overfile RCRA enforcement actions when the state fails to take timely and appropriate action" leaves open the matter of whether the state action herein was timely and appropriate, this is a matter of policy and prosecutorial discretion not subject to question in a civil penalty proceeding.

Accordingly, if this proceeding is barred because of the prior DOE enforcement action, it can only be by estoppel. In this connection, similarities between DOE's comments to PWT on August 4 and EPA's comments to DOE on the closure plan on August 10, 1983, are striking and obvious[23/] and it will be recalled that EPA submitted its initial comments to DOE by telefax on July 27, 1983. Although this telefax is not in the record, it seems unlikely that it differed materially from views to DOE expressed in the August 10 letter.

Respecting groundwater monitoring, the DOE letter to PWT states that the draft document has not addressed the implementation of a groundwater monitoring plan designed to show the facility's impact on the quality of groundwater in the uppermost aquifer. Additionally, the letter states that the seasonally saturated zone addressed in the document may not qualify

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23/ This is evident in, among others, the statements concerning compaction of liner and cap, removal of contaminated soil underlying the refuse area down to cement gravel, the possibility that groundwater may enter the waste cell from the east sand mica layer and the fact the toe drain should be in or beneath the waste cell in order to drain the cell.

as an aquifer, and that the lower, year-around aquifer must be monitored with one upgradient and three downgradient wells. While existing domestic wells may, in part, be utilized for sampling purposes, the letter emphasized that a quality monitoring well should, however, be installed upgradient of the site to yield accurate soil profiles and establish background water quality. The EPA letter of August 10 stated flatly that unsaturated zone monitoring is not required by RCRA, that PWT needs to design a groundwater monitoring system which is consistent with 40 CFR 265, Subpart F and which recognizes that the site will be closed, that the system should include four monitoring wells (one up and three down) and that some of these wells may be wells already identified in the preliminary groundwater report.

The mentioned EPA letter also stated that chemical parameters proposed are not totally appropriate for post-closure groundwater monitoring and that parameters selected should reflect hazardous waste in the pit, e.g., penta and creosote. Consistent with this recommendation, the DOE letter to PWT pointed out that inasmuch as we are using Part 265, Subpart F merely as guidance, we have the latitude of altering parameters to be analyzed and recommended deletion of fluoride, coliform bacteria, manganese, sodium and sulphate from the plan and the addition of copper, penta and napthalene. A copy of this letter was sent to EPA. The foregoing together with the "equivalent to" language in the EPA letter regarding interim status closure and post-closure requirements (ante at 11) would seem to establish beyond peradventure that despite the assertions groundwater monitoring in accordance with 265, Subpart F, should be accomplished, neither EPA nor DOE considered the Part 265 standards to be binding. In

view of the fact the version of § 265.1(b) then in effect clearly provided that the Part 265 standards were applicable to owners or operators of hazardous waste facilities who have fully complied with the requirements for interim status and a clarifying amendment had not yet been issued (note 19, supra), DOE as well as EPA and PWT may be foregiven for this misunderstanding, if it be such.

In the face of apparent strong EPA and DOE pronouncements as to the necessity of monitoring the uppermost aquifer, it is not clear why a system Complainant now alleges is patently inadequate came to be approved. The DOE letter to PWT specifically required lysimeters and/or wells to be installed in accordance with Chapter 18.104 RCW and Chapter 173-160 WAC and, as we have seen, EPA's letter to DOE specifically contemplated use, at least in part, of existing domestic wells for monitoring purposes. After the EPA and DOE comments on the draft plans were distributed, the plans were discussed at a meeting on August 18, 1983. While no notes or summaries of the discussion are in the record, a representative of EPA attended this meeting. The point, of course, being that Complainant's present attempt to distance itself from approval of the closure does not appear to accord with the facts and, as PWT contends, it is highly unlikely that EPA was unaware of DOE's belief that it was acting with EPA concurrence in approving the closure.

In Community Health Services v. Heckler, supra, the Supreme Court held that the requirements for estoppel had not been established, reliance on the advice in question having been determined not justified, and the question of whether estoppel can ever be applied against the Federal government was

left open.[24]/ Traditional requirements for invoking estoppel are that the party to be estopped must know the facts, must intend that his conduct shall be acted on, or must so act that the party asserting estoppel has a right to believe it is so intended, the party asserting estoppel must have been ignorant of the facts and the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury. TRW, Inc. v. FTC, supra. See also Emery Mining Corporation v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984). Additionally, if estoppel is to be invoked against the government, there must be a showing of affirmative misconduct, which is something more than mere negligence.

Applying these principles to the facts herein, we have indicated previously that it was reasonable for EPA, no less than DOE and PWT to conclude that strict compliance with Part 265, Subpart F was not required, the clarifying amendment to § 265.1(b) not yet having been issued (ante at 24). Nevertheless, and even if it be conceded that the other requirements for estoppel have been made out, it has not been established that EPA affirmatively approved the closure and mere acquiescence even with knowledge of all the facts, would not amount to affirmative misconduct. Moreover, estoppel may not be invoked to contradict a clear mandate of Congress (Emery Mining Corporation, supra) and the Congressional policy as to landfills such as PWT's appears to be clearly set forth in § 305(i) of the Act, as amended (note 14, supra). It follows that Complainant may not be estopped to prosecute this action, the facts found herein being matters to be considered in determining an appropriate penalty, if any.

24/ See United States v. Locke, 105 S.Ct. 1785 (1985), footnote 7 and the concurring opinion of Justice O'Connor.

The motion to dismiss or, in the alternative, for an accelerated decision is lacking in merit and must be denied.

O R D E R

The motion to dismiss or, in the alternative, for an accelerated decision is denied.

The parties are directed to inform the ALJ on or before September 12, 1986, of their views on further proceedings in this matter, i.e., whether a hearing will be required or whether the matter can be decided on the facts here found or on a stipulation.25/

Dated this 27th day of August 1986.

Spencer T. Nissen
Administrative Law Judge

Attachment

25/ In my order, dated May 9, 1986, establishing a briefing schedule, I indicated that prehearing submittals would be due within 10 days after the motion, if denied, was decided (served). In addition to documents previously requested, Complainant is directed to furnish copies of PWT's original Part A application, dated November 14, 1980, copies of the draft closure plan submitted on July 15, 1983, copies of the telefax comments to DOE of July 27, 1983, on the closoure plan and copies of any notes or memoranda on meetings attended by EPA personnel with PWT and DOE representatives where the closure plan was discussed.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Opinion and Order Denying Motion to Dismiss Or, Alternatively, For An Accelerated Decision, dated August 27, 1986, in re: Pacific Wood Treating Corporation, was mailed to the Regional Hearing Clerk, Reg. X, and a copy was mailed to each party in the proceeding as follows:

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Helen F. Handon

Helen F. Handon
Secretary

Aguust 27, 1986